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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF Albert Edward Best, Deceased, petitioner

v.

DISTRICT OF COLUMBIA, RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF RESPONDENT

OPINION OF THE COURT BELOW

The opinion of the Court below is found on pages 10 to 17 of the Record and 61 Wash. Law. Rep. 578.

QUESTION PRESENTED

The question presented is whether the facts announced in the opening statement of petitioner's counsel, if proved, were sufficient to sustain a verdict.

ADDITIONAL STATEMENT OF THE CASE

Petitioner's counsel on page 2 of the brief, in the second sentence under the heading "Statement of the Case" asserts: "The declaration, among other things, alleged that the respondent, District of Columbia, *maintained a wharf which was adjacent to a public street, frequented by many people and children;* * * *". (Italics supplied.) This is not the fact because the declaration (R. 1.) does not have a comma after the word "street". The placing of the comma after the word "street" would indicate that the clause "frequented by many people and children" referred to the wharf, when without the comma, as was alleged in the declaration, it refers to the street. Thus counsel for petitioner, by the insertion of a comma, attempts to have the clause "frequented by many people and children" refer to the wharf instead of the public street as was the fact alleged in the declaration.

The note on page 3 of petitioner's brief explains that the bill of exceptions contains the punctuation of a court stenographer. The bill of exceptions was drawn by petitioner's counsel, approved by both counsel, and signed by the Court. The bill of exceptions states the true facts.

On page 3 and the bottom of pages 5 and 8 of the petitioner's brief certain additions and omissions to the counsel's opening statement are set forth. Thus at page 5 of the petitioner's brief he

says "that the place of the nuisance was right off the street" and "the side portion of the barrier *at* the street was down * * *". On page 8 we find "a sand pile, which was to be seen from the street, was unfenced and in a place open to whomsoever chose to enter. The children had been allowed to play about the place. Defendant had permitted them so to do." These statements are not consistent with the Record and rather than point out the inconsistencies and those appearing on page 3 of his brief, the opening statement, being short, is herewith set forth for the convenience of the Court (R. 7 and 8):

> * * * that Mr. Best's son was a child of five years of age and that on the day in question he and other children were playing down at a wharf close to where the Norfolk boats leave for Norfolk, and this wharf was operated and controlled by the District of Columbia; that they had there on this wharf some boards which extended over the water and they had in the wharf, as several witnesses will testify, from ten to thirteen holes of various and varying sizes; that one of the holes was quite large, approximately 3 feet in diameter; that this place was not fenced off; that it did have some sort of a barrier close to the street. There was no sidewalk, but the side portion was down and that the children went in and out at their pleasure, and that this son of Mr. Best went in there

on this morning and while in there fell through one of the holes in this wharf.

That there was no one there at the time to keep the children away, and that the watchman who was stationed arrived some time after this occurrence; that the children used this place to play on and play in; and that the District having maintained it in a condition such that it was dangerous to the life and limb of these children it is responsible for the child having been attracted there, going in and falling through this hole.

* * *

That this wharf is not part of the public highway but is on private property of the District of Columbia, and is not a place to which the public is admitted, but is a place where the boats dock and unload sand which is taken out and used by the District.

Counsel for petitioner also states on page 2 of his brief that under the rules of pleading certain allegations of the declaration were deemed admitted because of no denial in the plea. Law Rule No. 29 of the Supreme Court of the District of Columbia, in force at the time of the filing of the declaration and the trial of the cause provided:

Every material allegation of fact in a pleading, other than of value or amount of damage, which is not denied by the adverse party, shall be deemed to be admitted, unless the latter avers that he had no knowledge or

> information thereof sufficient to form a belief, in which case it shall be deemed to be denied.

Defendant's plea (R. 5) contained the following:

> And as to each and every other allegation of fact in the said declaration, defendant avers that it has no knowledge or information thereof sufficient to form a belief * * *.

This clearly amounts to a denial under the Rules of Court and counsel was in error when he stated that the allegations contained at the bottom of page 2 of his brief were admitted.

SUMMARY OF ARGUMENT

I. The facts contained in the opening statement, if proved, would not warrant the submission of the cause to the jury.

II. The doctrine announced in the "Turntable" case *Sioux City and P.R. Co.* v. *Stout,* 17 Wall. 657, 21 Law Ed. 745, and the "Slack pit" case, *Union P. R. Co.* v. *McDonald,* 152 U.S. 262; 38 L. Ed. 434, is not applicable to the case at bar.

III. The directing of the verdict by the Trial Justice at the conclusion of the opening statement was proper and in accordance with the approved procedure.

I

THE FACTS CONTAINED IN THE OPENING STATEMENT, IF PROVED, WOULD NOT WARRANT THE SUBMISSION OF THE CASE TO THE JURY

To make out a case against respondent under the doctrine of attractive nuisance it was necessary for the petitioner to show:

1. The injured child was too young to understand and avoid the danger.

2. The danger was a latent one.

3. The danger was a place where children had a right to be and there was reason to anticipate the presence of children.

4. There was a strong likelihood of the accident.

5. The danger was one other than those ordinarily encountered.

6. The precautions not taken were such as a reasonable and prudent person would have taken under the circumstances.

The facts offered to be proved by Counsel in the opening statement were:

1. There was no sidewalk on that side of the street (R. 7). This indicates that there were no facilities for pedestrians.

2. There was some sort of a barrier close to the street (R. 7), indicating that persons were not invited or permitted to enter the District property at the end of which was located the wharf.

3. The wharf is not a part of the public highway but is on private property of the District of Columbia (R. 8).

4. The wharf where petitioner's intestate met his death and adjoining District property *is not a place to which the public was admitted* (R.).

There was a complete failure to prove the following essential facts:

1. The wharf could be seen from the public space.

2. That the child was attracted by the presence of the wharf itself, or any article or thing which may have been upon the wharf.

3. That there was any latent or hidden danger at the place where the petitioner's intestate met his death.

4. That there was ever a prior accident to children at or near this wharf.

5. That respondent invited or permitted petitioner's intestate or other children to enter or play on its wharf (R. 7 and 8).

If counsel had any evidence whatever to prove these facts he would have certainly so stated. From his failure, it must be assumed the evidence would not have proven these facts.

The statement that "children went in and out at their pleasure" (R. 7) and that "children used this place to play on and play in * * *" (R. 8) is not enough to show an invitation or permission on behalf of the respondent. *Nowhere was it stated that respondent permitted children to play on the wharf of the District property. Nowhere was it stated that the District of Columbia knew*

that the children used the property to play on or play in. Nowhere was it stated that the conduct of the children was such as to create a constructive notice to the respondent.

The accident occurred on Sunday morning. Counsel, in his opening statement asserted that "there was no one there *at that time to keep children away, and that the watchman who was stationed there arrived some time after this occurrence.*" There is only one inference to be obtained from this statement and that is, that the watchman would have prevented the children from coming upon the premises, and the fact that the wharf "is not a place to which the public is admitted" definitely negatives any permission or invitation to a five-year-old child to play on the wharf on a Sunday morning.

The leading case in the District of Columbia, and one similar in point of fact, is *Sullivan* v. *Huidekoper,* 27 App. D.C. 154. The declaration in that case alleged that the defendant was the owner of a parcel of land near the intersection of 37th and W Streets, Northwest, over which flowed two small streams of water. The streets were so constructed that they acted as a dam to the water flowing over the land thereby causing a pond to be formed of a size about 250 feet long by 90 feet wide, with a depth varying from 6 to 10 feet, and its bottom was covered by a dangerous, muddy and sticky mire two feet in thickness; that in the immediate vicin-

ity of and surrounding the land were the residences of a large number of persons, including many children of a tender age, and that the pond was attractive to children, many of whom were and had been for a number of years accustomed to play about and wade and swim in it. *There was no fence around the pond, and all of these facts were known to the defendant.* The plaintiff's intestate was ignorant of the dangerous character of the pond, and went to the lot with other children and fell or went into the said pond and was drowned. A demurrer was filed to the declaration, sustained by the Trial Court, and its ruling was sustained by the Court of Appeals.

It will thus be seen that in the *Sullivan case supra,* the grounds of negligence were much stronger than those in the case at bar, as the pond was immediately adjacent to the street, and caused by the construction of the streets. In this case the river was some distance away, exact distance not being shown; in the *Sullivan case* the pond was visible from the public highway; in this case such fact was not stated; in the *Sullivan case* there was no fence or barrier, in this case there was some sort of a barrier close to the street; in the *Sullivan case* the defendant was aware of the fact that the children played in and about the pond, in this case there is no allegation of notice, and in fact, the public was not admitted to the property in question, but the same was used for the unloading of sand from the river boats.

The Court after referring to and distinguishing the "turntable" case, *sioux City and P. R. Co.* v. *Stout,* 17 Wall. 657, 21 Law Ed. 745, and the "slack pit" case, *Union P. R. Co.* v. *McDonald,* 152 U.S. 262, 38 L.Ed. 434, said (p. 159):

> * * * To hold an owner of real estate, upon which there is a body of water, liable for the accidents that may happen to children while trespassing thereon, would be to place upon them an unfair burden. The danger is one that cannot be guarded against without considerable expense or inconvenience.
>
> The cases holding that there is no duty upon the part of a real estate owner, upon whose land is a pond or other body of water to keep his land safe for trespassers even when those trespassers are children, seem to us to be founded upon and supported by reason and common sense. *The primary duty to guard and protect a child against patent and unconcealed dangers devolves upon the parent, and not upon a stranger.* (Italics ours.)

In *McCabe* v. *American Woolen Co.,* 124 Fed. 283, affirmed in 65 C.C.A. 59, 132 Fed. 1006, the court sustained a demurrer, and held the declaration insufficient, where it appeared that the defendant maintained an unguarded mill trench, having precipitous banks, near the house of the father of the child, who fell in and was drowned. The court, while recognizing the Stout and Mc-

Donald cases, said: "The case at bar, however, is essentially distinct in this particular. This canal was permanent, open, and plain to view—as much so as though it had been a natural stream—and suggests nothing whatever which would change the relations of the parties from what they would have been had it been a brook or a river. If the defendant is to be holden to this plaintiff for not especially guarding it, then the customs of the community must be changed throughout, because it is impossible to distinguish this canal, for the purposes of this case, from a river or a brook, a haymow, an ox cart left in a farmer's yard, a high ledge, or a field trench about either of which children may happen to be accustomed to play. We think, therefore, that this canal was an object of such a character that, both from the reason of the thing and the customs of the community, the defendant was entitled to assume that the plaintiff's natural guardians would protect him from any dangers attached thereto, as they easily could and ought to have done. Therefore, on account of the various distinctions which we have pointed out, and the reasons which we have stated, this suit cannot be maintained."

The Supreme Court of California, in *Peters* v. *Bowman,* 115 Cal. 345, laid down the following rule concerning liability of a defendant for an open and unguarded river, lake, or other body of water.

It appeared the defendant permitted a pond to remain on his premises unguarded and unfenced.

Children played upon it, and one of them, while floating on a raft, fell and was drowned. The Court, recognizing and approving the "turntable" case, said:

> A body of water, either standing as in ponds or lakes, or running as in rivers and creeks, or ebbing and flowing as on the shores of seas and bays, is a natural object incident to all countries which are not deserts. Such a body of water may be found in, or close to, nearly every city or town in the land; the danger of drowning in it is an apparent, open danger, the knowledge of which is common to all; and there is no just view consistent with recognized rights of property owners which could compel one owning land upon which such water, or part of it, stands or flows, to fill it up or surround it with impenetrable wall.
>
> On a petition for a rehearing, it was said: "* * * A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot * * * would answer the purpose: and, therefore, to make it safe, it must either be filled or drained. * * * But ponds are always useful, and often necessary. * * * Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle, must the owner of a fruit tree be held liable for the death or injury of a child who, at-

> tracted by the fruit, climbs into the branches and falls out? But this, we imagine, is an absurdity, for which no one would contend; and it proves that the rule of the turntable cases does not rest upon a principle so broad and of such rigid application as counsel supposes. The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions."

In the case of *City of Baltimore* v. *Palma,* 137 Md. 179 (1920) the Court of Appeals of Maryland held the doctrine of attractive nuisance not applicable to the case of a child injured while playing on a lumber pier. The facts disclosed that persons who "had business relations" with the parties occupying the pier were permitted thereon. Other persons were not. It appears further, however, that children frequently played upon the pier and other children were playing upon the pier or wharf at the time of the injury to the plaintiff. The lower court permitted a recovery. The Court of Appeals reversed the same, holding nonliability on the part of the Municipality. This case is par-

ticularly important, not only from the standpoint that it holds nonliability of a city under almost identical facts as those presented in the case at bar, but also because the Common Law of the District is the same as that of Maryland by the force of Sec. 1 of the District of Columbia Code, which provides that the Common Law in force in Maryland on the 27th day of February 1801, and not inapplicable to the District of Columbia, shall remain in force unless inconsistent with the remaining sections of the Code. The Maryland Court at pages 188 and 189 of its opinion quoted with approval the case of *Birch* v. *City of New York,* 190 N.Y. 397. In the Birch case a boy fell through a hole in the wharf owned by the city. Various persons used the wharf for fishing and bathing, and several contractors used it for unloading cargoes of bricks and building materials. The plaintiff, after alighting from a boat at the pier fell through a hole in the wharf. The New York Court of Appeals held nonliability.

The opinion of the Maryland Court of Appeals in the above case was cited with approval in the recent case of *Lease* v. *Bealmear,* 130 Atl. 66, where the Court held nonliability when an infant plaintiff fell by reason of a loose board on the second floor of a building under construction.

In *Trogia* v. *Butte Mining Company,* the Circuit Court of Appeals of the Ninth Circuit, 270 Fed. 75 (1921), held nonliability for the drowning of

a child in a pool maintained upon the defendant's premises. The Court said the rule in the turntable case is the extreme expression of the duty of a landowner to keep his premises in a safe condition.

See Also:

Savannah, Florida and Western Railroad v. *Beavers,* 113 Ga. 398.

Zamaria v. *Davis, Director General,* 284 Pa. 524 (1925).

Thompson v. *Baltimore & Ohio R. R.,* 218 Pa. 444.

Beichert, Infant, v. *G. M. Laboratories, Inc.,* 242 N.Y. 168 (1926).

Lineburg v. *City of St. Paul,* 71 Minn. 245.

In the case of *Stendal* v. *Boyd,* 73 Minn. 53, 42 L.R.A. 288, that Court, in holding the defendant not liable in an attractive nuisance case, said:

> The doctrine of the turntable cases is an exception to the rule of nonliability of a landowner for accidents from visible causes to trespassers on his premises. If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises child proof. If the owner must guard an artificial pond on his premises, so as to prevent injury to children who may be attracted to it, he must, on the same principle, guard a natural pond; and, if the latter, why not a brook or creek, for all water is equally alluring to children? If he must fence in his stone quarry after it fills

> with water, so that children cannot reach it—a well-nigh impossible task—why should he not be required to do it before, for a stone quarry, with its steep and irregular sides, might well be an attractive and dangerous place to children?

The Court of Appeals in the case of *Sullivan* v. *Huidekaper,* supra, gave its approval to the following quotation from the decision of the Supreme Court of Pennsylvania in *Gillespie* v. *McGowan,* 100 Pa. 144, 45 Am. Rep. 365:

> Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to enclose it or fill up their ponds and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass especially where there is tempting fruit, yet I never heard that it was the duty of an owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches.

To hold the municipality liable in this case would, in effect, require the entire water front along the Potomac River, as well as both sides of the Eastern Branch and the Chesapeake and Ohio Canal to be boarded off, with a guard stationed at each entrance to the enclosure. It is submitted that a building in the course of construction is just as attractive to children as a wharf. It is a place where they may play and "take chances." Every contractor and builder must erect a substantial fence around the construction work if the appellant is to be permitted to recover in this case.

In the case of *Hegeage* v. *District of Columbia,* 42 Appeals, D.C., 109, the Court of Appeals reaffirmed the former rulings of the Court in the *McGraw* v. *District of Columbia case,* 3 App. D.C. 405, and *Sullivan* v. *Huidekoper,* 27 App. D.C. 154, and in its opinion the Court said:

> In the present case there was nothing inherently dangerous either in this alley or in the fact that the embankment wall along its southern side was not guarded. Children had played there for a considerable time apparently without mishap. Conditions were observable by all. If the District is to be held liable in this case, then it necessarily follows that it is its duty to fence every pond and every stream, and make absolutely safe every foot of ground under its jurisdiction, when children are liable to resort thereto.

It cannot be contended that the appellant's intestate was lawfully at the point where the fatal accident occurred. *The Record discloses that the wharf was on private property of the District and no part of the highway, and is not a place to which the public is admitted* (R. 8).

The most recent decision of the Court of Appeals of the District of Columbia is that of *Branan* v. *Wimsatt,* 54 App. 374. In that case a young child was climbing up the side of a lumber pile with other children when several boards became displaced, and fell upon her causing severe injuries. The Wimsatt lumber yard is located but a short distance from the District sand wharf. Children had played in the Wimsatt Lumber yard for a long time prior to the accident. The Court held nonliability on the part of the defendant and in its opinion said:

> Licensees enter upon the premises of another for their own interest, convenience, or gratification, and at least assume the risk of unconcealed dangers which are natural to the place, and which can be avoided by proper care. *Burchell* v. *Dickisson,* 50 L.J.Q.B. (N.S.) 101, 102; *Beehler* v. *Daniels,* 18 R.I. 563, 29 Atl. 6, 27 L.R.A. 512, 49 Am. St. Rep. 790; *Reardon* v. *Thompson,* 149 Mass. 267, 21 N.E. 369; *Schreiner* v. *Great Northern R. Co.,* 86 Minn. 245, 247, 90 N.W. 400, 58 L.R.A. 75; *Eisenberg* v. *Mo. Pac. R. Co.,* 33 Mo. App. 85, 90, 91; *Albert* v. *New York,* 75 App. Div. 553, 556, 557, 78 N.Y.

Supp. 355; *United Zinc Co.* v. *Britt,* 258 U.S. 268, 275, 42 Sup. Ct. 299, 66 L. Ed. 615.

We now come to the consideration of whether an invitation to enter may be implied from frequent entrance and user. The most that can be implied from entrance and user is a bare permission. A permission, whether express or implied, is not an invitation to enter or use, and establishes no higher relation that that of mere licensor and licensee. *Plummer* v. *Dill,* 156 Mass. 426, 427, 31 N.E. 128, 32 Am. St. Rep. 463; *McCoy* v. *Walsh,* 186 Mass. 369, 370, 371, 71 N.E. 792; *Evansville & Terre Haute* v. *Griffin,* 100 Ind. 221, 223, 50 Am. Rep. 783; *Furey* v. *N. Y. Central & Hudson R.R. Co.,* 67 N.J. Law. 270, 276, 51 Atl. 505.

Persons engaged in business may be considered as inviting the public to do business with them, and to enter their stores or places of business for that purpose; but it can hardly be said that that invitation is broad enough to include those who have no business to transact, and enter from curiosity or for their own interest, convenience, or gratification. *Severy* v. *Nickerson,* 120 Mass. 306, 307, 308, 21 Am. Rep. 514; *Ryan* v. *Towar,* 128 Mich. 463, 87 N.W. 644, 55 L.R.A. 310, 92 Am. St. Rep. 481; *Plummer* v. *Dill,* 156 Mass. 426, 427, 428, 31 N.E. 128, 32 Am. St. Rep. 463; *McEachern* v. *Boston & M. P. Co.,* 150 Mass. 515, 516, 517, 23 N.E. 231; *Reardon* v. *Thompson,* 149 Mass. 267, 21 N.E. 369; *Paolino* v. *McKendall,* 24 R.I.

432, 435, 53 Atl. 268, 60 L.R.A. 133, 96 Am. St. Rep. 736. Neither can it be said that an owner who tolerates a trespass, and who takes no steps to interfere with the practice, has impliedly extended an invitation to either invade or use his premises. *Evansville & Terre Haute* v. *Griffin, supra,* 223, 224; *Furey* v. *N. Y. Central & Hudson R.R. Co.,* 67 N.J. Law, 270, 274, 275, 51 Atl. 505.

* * * To hold that owners are bound to prevent children from swimming in ponds, entering buildings in course of construction, climbing fruit trees, rock piles, or fences, and from trespassing on property not inherently dangerous, or dangerous at all if properly used, would subject such property owners to an intolerable burden, and impose upon them a duty which would require almost superhuman vigilance to perform. *Loftus* v. *Dehail,* 133 Cal. 214, 65 Pac. 379, 380; *Gillespie* v. *McGowan,* 100 Pa. 144–150, 45 Am. Rep. 365. The duty devolves on natural guardians and lawful custodians to protect children from the consequences of their restless spirit of adventure, and that duty cannot justly be wholly transferred to strangers, who are under no obligation to keep watch and ward over the children of others. *Tomlinson* v. *Vickburg R. Co.,* 143 La. 641, 642, 79 South. 174; *Sullivan* v. *Huidekoper,* 27 App. D.C. 154, 5 L.R.A. (N.S.) 263, 7 Ann. Cas. 196.

* * * * *

> Whether the principle established by the earlier decisions is still in force, the facts of this case do not require us to decide, although it may well be doubted whether those decisions can be reconciled with the later ruling. We do say, however, that we are under no obligation to extend the doctrine declared in *Railroad Co.* v. *Stout* to property or children not of the class contemplated by the court in that case.
>
> * * * If the owner of a deadly pool be not responsible to children who use it for a purpose for which it seems to be fit, certainly the owner of an everyday lumber yard should not be held answerable for injuries to minors who, knowing the danger, devote his lumber piles to a use for which they were not designed or suitable.
>
> The appellee was not bound to hire guards to exclude the children from his premises, or to employ a supervisor to control their playful activities, or to so arrange his lumber yard that it might be safely used for games of tag or hide and seek. *Powers* v. *Owego Bridge Co.*, 97 App. Div. 477, 89 N.Y. Supp. 1030, 1031; *United Zinc Co.* v. *Britt, supra,* 275 (42 Sup. Ct. 299).

Petition for writ of certiorari was denied by this Court June 9, 1924, 265 U.S. 591, 68 L. ed. 1195.

Several of the state Courts have held that an infant injured on an unlocked and unguarded turntable is not entitled to recovery.

The Supreme Judicial Court of Massachusetts in the case of *Daniels* v. *New York and New England Railroad Co.,* 154 Mass. 349, held nonliability in case of turntable located 600 feet from a public street.

This case was followed and approved in the case of *Walker, Admr.* v. *Potomac, Fredericksburg Railroad Co.,* 105 Va. 226. The Supreme Court of Appeals of Virginia held there was no liability on the part of the railroad maintaining a turntable about 360 feet from a public road, even though the turntable had been used by children to play on, and this fact was known to the agent of the railroad company. The Court held that before the plaintiff could recover it must appear that the defendant company owed his intestate some duty which it failed to discharge, and where there is no duty there can be no negligence.

To the same effect is the case of *Walsh, an Infant,* v. *The Fitchburg Railroad Co.,* 145 N.Y. Rep. 301. The opinion was delivered by Mr. Justice Peckham, later appointed to the Supreme Court of the United States.

Also in the case of *Conrad* v. *Baltimore & Ohio R.R. Co.,* the Supreme Court of Appeals of West Virginia in 1908 declared nonliability on the part of a defendant where the plaintiff was injured due to an unlocked, unfastened and unguarded turntable located in a thickly settled community near a public street, and on ground on which children congregated

to play. The Court held that the doctrine of the turntable case had been repudiated in the Courts of Massachusetts, New York, New Hampshire, New Jersey, Texas, Pennsylvania, Ohio, Virginia, and West Virginia.

In the cases where a recovery has been permitted on the doctrine of attractive nuisance the courts have required the plaintiff to show substantially that the place or thing causing the injury was inherently dangerous; that such danger was known to the defendant, and not known to the plaintiff, and its dangerous qualities were not apparent; that the plaintiff was at the place of danger with the permission or invitation, expressed or implied, of the defendant.

It may be well to consider whether the ruling in many of the earlier cases on the doctrine of attractive nuisance are now applicable due to the changed conditions in practically all urban communities. Fifty or one hundred years ago children residing in cities were compelled to play at such places as they were able to seek, while today, the government expends large sums of money in acquiring property and equipment for large and extensive playgrounds, and maintaining same, where children may indulge in play and sports with a minimum amount of danger. These playgrounds are located adjacent to practically all the public schools and at other points throughout the city.

II

THE DOCTRINE ANNOUNCED IN THE "TURNTABLE" CASE, *SIOUX CITY AND P. R. CO.* v. *STOUT*, 17 WALL. 657, 21 LAW ED. 745, AND THE "SLACK PIT" CASE, *UNION P. R. CO.* v. *McDONALD*, 152 U.S. 262; 38 L. ED. 434, IS NOT APPLICABLE TO THE CASE AT BAR

In the turntable case, *supra,* the injury was occasioned by dangerous machinery on which children had been permitted to play, and the danger of injury to a child was not apparent. The slack pit case, supra, presented a condition equally dangerous as the turntable case. In the slack pit case an undisclosed fire was permitted to burn contiguous to a path over which children were permitted to walk with the consent of the defendant. There was a violation of a statute which required the slack pit to be fenced. For the convenience of the Court there is herewith set forth the more important differences or distinctions between the case at bar involving a wharf and the turntable and slack pit cases:

Turntable case	Slack pit case	Wharf case
In open space	No fence or guard	Barrier at street.
Children had played on turntable while defendant's employees were present.	Children allowed at mine and path near slack pit.	Never played or permitted on premises when D.C. employees present.
Turntable—dangerous machine.	Slack pit—dangerous	Wharf—not dangerous.
Latent danger	Latent danger	Patent danger.
	Statute required fencing of slack pit.	Public not permitted on wharf or adjoining District property.

In *Sioux City and P. R. Co.* v. *Stout, supra,* the Court at page 663 said:

> The evidence is not strong and the negligence is slight but we are not able to say that there is not evidence sufficient to justify the verdict.

It is respectfully submitted that the case at bar should be controlled by the decision of this Court in *United Zinc Co.* v. *Britt,* 258 U.S. 268. The court there held nonliability on the part of the owner of premises upon which existed a pool of deadly poisonous waters although outwardly presenting an appearance of complete safety. The Court therein stated (page 275):

> Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon the landowners to expect them and to prepare for their safety.

And also at page 276 the Court said:

> * * * There can be no general duty on the part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there.

The decision of this Court in *N.Y., N.H. and H. R.R. Company* v. *Fruchter,* 260 U.S. 141 holds nonliability of a defendant for injuries sustained by an eight-year-old child who climbed to the top of a bridge and came in contact with an electric wire.

It should not be lost sight of that the danger in the case at bar was open and apparent and one which a five-year-old child would ordinarily avoid.

In the *Britt case, supra,* the danger was not apparent. In fact it was attractively disguised. A great many cases are referred to in the briefs and arguments in the *Britt case, supra.* This question has also been the subject of much annotations, 36 A.L.R. 1 to 294, and 45 A.L.R. 973 to 993.

It is submitted that the tendency of the Court is now to limit the doctrine of attractive nuisance to dangerous machinery, contrivances or places which present a situation of apparent safety but in fact are actually dangerous, coupled with a permission or invitation to children to play at the place in question.

In *Erie R.R. Co. v. Duplak,* 286 U.S. 441, a five-year-old boy was injured while playing upon a railroad bridge. A state statute made it unlawful "for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; * * *". The lower court permitted a recovery. This Court reversed the decision on the ground of nonliability in view of the statute. The Court at pages 443 and 444 of the opinion, in discussing the question and in referring to previous cases, said:

> "The statute", this court said (p. 101), "seemingly adopts in an unqualified form the policy of the common law as understood

we believe, in New Jersey, Massachusetts, and some other States, that while a landowner cannot intentionally injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there."

III

THE DIRECTING OF THE VERDICT BY THE TRIAL JUSTICE AT THE CONCLUSION OF THE OPENING STATEMENT WAS PROPER AND IN ACCORDANCE WITH THE APPROVED PROCEDURE

Petitioner's counsel, at page 9 of his brief, refers to the case of *Hornblower* v. *George Washington University,* 31 App. D.C. 64, which case holds that a trial justice has the right, in fact, it is his duty, to direct a verdict upon the insufficiency of facts set forth in an opening statement. The Court stated that such a decision is not the one ordinarily reached, but is proper where the opening statement clearly shows that no cause of action exists. The Court did not say that a directed verdict should not be granted upon an insufficient opening statement. The Court, in that case, affirmed the judgment of the trial court where a verdict for the defendant was directed upon an opening statement.

The petitioner did not assign as error in the lower court nor was there any reference in the briefs or argument of counsel for either party in

the Court of Appeals of the procedure followed by the trial justice in directing a verdict. Apparently, counsel referred to *Hornblower* v. *George Washington University, supra,* by reason of the following language contained in the opinion of the Court of Appeals (R. 11 and 12):

> We cannot commend the procedure adopted by counsel for the defendant in filing the motion for a directed verdict at the close of plaintiff's statement to the jury. The motion raises issues which could properly have been submitted by a motion to dismiss the petition for want of substance. Had such a motion been submitted in ordinary course, the trial justice would have been given time in which to consider it, and in case it was sustained the plaintiff might have desired and been given an opportunity to amend. The course pursued in this case resulted in the dismissal of the cause before any testimony was taken, and under circumstances equivalent to a surprise, such as made it difficult for the plaintiff to amend his pleading if such course seemed proper and desirable.

It is respectfully submitted that the procedure adopted by counsel for the respondent should be commended as being in accordance with the recognized practice of the Supreme Court of the District of Columbia and twice approved by the Court of Appeals, which court now says it "cannot commend the procedure" which leads to the directing a verdict on an opening statement.

In *Brown* v. *District of Columbia,* 29 App. D.C. 273, the opinion of the Court discloses that at the conclusion of the opening statement of plaintiff's counsel the Court directed a verdict in favor of the District of Columbia. The Court, at page 280–281, quoted from the decision of this Court in *Oscanyan* v. *Winchester Repeating Arms Company,* 103 U.S. 261. The opinion then continues, page 281:

> It was in the interest, therefore, of the speedy administration of justice, to act upon the admission when deliberately made, and avoid the delay that would be caused by the production of evidence.

Counsel has been unable to find any case decided by the Court of Appeals subsequent to the above-mentioned cases which holds that the practice of requesting the Court for a binding instruction upon the insufficiency of the plaintiff's case was not a commendable practice. The Court of Appeals neither referred to nor cited any such cases.

The decision of this Court in *Oscanyan* v. *Winchester Repeating Arms Company,* 103 U.S. 261, is clear and decisive upon the question. The opinion of the Court refers, with approval, to many decided cases. The opinion quotes with approval, page 265, the language of Mr. Justice Swayne, as follows:

> "According to the settled practice in the Courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have

> been idle to proceed further, when such must be the inevitable result. The practice is a wise one; it saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the province of the judge and jury, and fixes, where it belongs, the responsibility which should be assumed by the Court." 10 Wall. 637 (77 U.S. XIX, 1015).

It may be assumed that petitioner's counsel was completely familiar with his case. He drew the declaration and was personally handling the case at the trial. He naturally outlined his strongest possible case to the jury in the opening statement. Petitioner's counsel did not contend that the Court did not afford every opportunity for an enlargement of the opening statement, or that the trial court's decision was hurriedly reached.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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